

Board of Alien Labor Certification Appeals
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

DATE: May 29, 1997

CASE NO: 95-INA-631

In the Matter of:

LORI EGAN-BARNEY,
Employer,

On Behalf of:

BERTA LILIAN RIVERA,
Alien

Appearance: Pablo Santiago, Jr., Esq., Washington, D. C.

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Berta Lilian Rivera (Alien) by Lori Egan-Barney, (Employer), under § 212(a)(5) (A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR, Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at Philadelphia, Pennsylvania, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.¹

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.²

Statement of the Case

On December 22, 1993, the Employer applied for labor certification to permit her to employ the Alien on a permanent basis as a "Cook (Domestic Service) to perform the following duties in her household:

Plans menus and cooks meals, in private home, according to recipes or tastes of employer. Prepares/cooks vegetables, meats, fish, and pastas. Prepares/bakes breads, cakes, cookies, pies, and other pastries. Serves meals to employer and/or to guests whenever employer is entertaining. Primarily responsible for the preparation and cooking of all food for a toddler who is unable to eat processed foods due to medical problem. Responsible for shopping for all groceries, meats, fish, poultry, vegetables, etc.

The position was classified as "Cook, Domestic Services" under DOT Code No. 305.281-010.³ The application (ETA 750A) indicated no minimum education requirement, but specified that applicants must have two years of experience in the Job Offered. As Other Special Requirements, the Employer specified,

Applicant must be honest and dependable as evidenced by references from previous employers. Applicant must be willing to work additional and/or flexible hours as employer does a substantial amount of entertaining. Applicant must be non-smoker.

²As the CO has failed to number the pages of the Record, the file references will be less than precise.

³Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

The basic workweek is forty hours from 8:00 AM to 5:00 PM, at \$10.46 per hour, with a varying amount of overtime at time and one half per hour.⁴

Notice of Findings. On December 5, 1994, Notice of Findings (NOF) was issued to advise that certification would be denied unless the Employer corrected the defects that the CO noted. The CO said the Employer's application failed to not establish that the position at issue was full time work within the meaning of 20 CFR § 656.3 (Subpart A). In this respect, the CO specified the evidence needed for the Employer to prove that the job offered is a full time position in order to give Employer an opportunity to answer with facts that the position is, in fact, a fulltime job. The CO also found that Employer failed to show that its rejection of the one U. S. worker who applied was lawful under the Act and regulations in proving that it made a "good faith" recruitment effort under 20 CFR §§ 656.21(b)(6) and 656.20(c)(8).

Rebuttal. On April 10, 1995, the Employer filed a rebuttal in which Ms. Egan-Barney described her family's need for the services of a cook, indicating the approximate number of hours during which such work would be performed. She also asserted that the worker would be employed exclusively to prepare and serve meals in this household. The Employer admitted that no effort was made to reach or to offer the position to the U. S. worker who responded to the Employer's recruiting advertisement, and the Employer offered arguments to justify her failure to contact the U. S. job applicant.

Final Determination. On June 26, 1995, the CO denied certification on grounds that (1) the Employer failed to prove that the position was fulltime employment under the Act and regulations; and (2) the Employer failed to establish that U. S. workers are not able, willing, qualified, or available for the job. The CO pointed out that the Employer failed to document her assertions as to the time required to perform the position at issue and that the one U. S. applicant for this position was rejected for lawful, work related reasons.

Employer's appeal. In seeking review of the denial of certification the Employer argued that the CO's finding that this was not a fulltime job erroneously interpreted the Employer's own estimates of the work required to perform the job, and failed to

⁴The amount of the overtime rate is assumed to be time and a half, as Employer inserted "\$X½" per hour in the application for this entry. In the NOF the CO directed the Employer to increase the wage offer of \$7.22 to the level of the local prevailing wage of \$10.46, as provided by 20 CFR §§ 656.20(c)(2), 656.20(g), and 656.21(g)(4). As The Employer complied with the NOF in this respect, this issue will not be mentioned infra, and the amended hourly rate is consistent with the local prevailing wage.

take into consideration other time consuming work that would be part of the job. Second, the Employer contended that she was not obliged to contact the U. S. worker who was referred for this position for the purposes of offering an interview, and that her application for certification should not be rejected solely as a result of her refusal and neglect to do so.

DISCUSSION

Before discussing this appeal it is appropriate to observe that the privileged status certification would confer on the Alien is an exception to the statutory limitations on the admission of immigrants into the United States for permanent residence and employment. Consequently, certification under the Act and regulations is a privilege that is conferred by providing favored treatment to specified classes of foreign workers whose skills Congress seeks to bring to the U. S. labor market where such services are needed. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). The scope and nature of this statutory privilege is clearly indicated by 20 CFR § 656.2(b), which quoted from § 291 of the Act (8 U. S. C. 1361) the burden of proof that Congress placed on applicants in such certification proceedings as this to effectuate the purposes of the Act:

Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act⁵

The Employer seeks certification for the Alien under this exception to the provisions Congress adopted to limit immigration to the United States. As such an exception to this statute of general application, the award of certification is to be strictly construed. It follows that the Employer is expected to comply with the terms of the Act and regulations with such diligence as is commensurate with the favorable and advantageous treatment as the Employer seeks in its application for special permission for this Alien to enter the United States lawfully and to hold this position of permanent employment.

The CO correctly construed the Employer's failure to contact and interview the one U. S. worker who applied for this job as definitive evidence that she did not sustain her burden of proving that the U. S. candidate was rejected solely for lawful job related reasons or that this job opportunity was open to any

⁵See **Pesikoff v. Secretary of Labor**, 501 F2d 757, 761-762(D.C. Cir., 1974), Cert den. --- U. S. ---, 95 S.Ct 525(Nov. 25, 1974).

qualified U. S. worker. 20 CFR §§ 656.21(b)(6), 656.20(c)(8). The reason is that the Employer must establish that the applicant was unqualified and was lawfully rejected under its burden of proof in 20 CFR §§ 656.21(b)(6) and 656.20(c)(8). **Nancy, Ltd**, 88 INA 358 (Apr. 27, 1989)(en banc). As the Board indicated in **Nancy Ltd** that an employer could not reject an apparently qualified applicant on the basis of a resume without making a further investigation of a candidate's qualifications by an interview or by other means, in this case the Employer was required to present persuasive proof that the U. S. applicant was not qualified to perform the duties of the position at issue. Neither documentation nor other evidence supports the Employer's argument that she was not required to interview the job candidate or to investigate the qualifications of the U. S. worker by any other means, however.

Summary. While the Act and the regulations do not explicitly state a "good faith" requirement as to post filing recruitment, the Board has long held that such a good faith requirement is implicit in 20 CFR §§ 656.21(b)(6) and 656.20(c)(8). **Neil Clark**, 95 INA 092 (Jan. 27, 1997), citing **H. C. LaMarche Ent., Inc.**, 87 INA 607 (Oct. 27, 1988). Consequently it is concluded that this Employer failed to make a good faith effort to recruit a U.S. worker for this job and that as a result she failed to sustain her burden of proving that this job opportunity was open to any qualified U. S. worker.

Accordingly, the following order will enter.

ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is affirmed for the reasons set forth hereinabove.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

CASE NO: 95-INA-631

LORI EGAN-BARNEY,
Employer,

BERTA LILIAN RIVERA,
Alien

PLEASE INITIAL THE APPROPRIATE BOX.

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	:	CONCUR	:	DISSENT	:	COMMENT	:
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Holmes	:	:	:	:	:	:	:
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Huddleston	:	:	:	:	:	:	:
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Thank you,

Judge Neusner

Date: April 2, 1997